(11)

No. 95-8836

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ELLIS WAYNE FELKER, *Petitioner*,

v.

TONY TURPIN, Warden, *Respondent*.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT AND PETITION FOR WRIT OF HABEAS CORPUS

BRIEF OF AMICI CURIAE ALABAMA, ARIZONA, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, FLORIDA, HAWAII, IDAHO, ILLINOIS, KENTUCKY, MASSACHUSETTS, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW JERSEY, NEW YORK, NORTH CAROLINA, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, RHODE ISLAND, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, WASHINGTON, WISCONSIN, and WYOMING IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. Whether Title I of the Anti-Terrorism and Effective Death Penalty Act of 1996 (the Act), and in particular Section 106(b)(3)(E), 28 U.S.C. § 2244(b)(3)(E), is an unconstitutional restriction of the jurisdiction of this Court.

2. Whether and to what extent the provisions of Title I of the Act apply to petitions for habeas corpus filed as original matters in this Court pursuant to 28 U.S.C. § 2241.

3. Whether application of the Act in this case is a suspension of the writ of habeas corpus in violation of Art. I, § 9, clause 2 of the Constitution.

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INTEREST OF AMICI CURIAE

This case presents the first opportunity for the Court to review the federal habeas corpus reform provisions enacted by Congress in the Anti-Terrorism and Effective Death Penalty Act of 1996 (the Act) and signed into law by the President on April 24, 1996. Amici are States which are required to defend their presumptively final and valid state court judgments against federal habeas corpus challenges. Because successive and duplicative federal review threatens the States' interests in the finality and enforcement of their criminal judgments, amici have a particular concern in the validity of the Act.

This brief is submitted in support of respondent by amici through their respective Attorneys General in accordance with Rule 37.4 of the Rules of the United States Supreme Court.

SUMMARY OF ARGUMENT

1. Article III, § 2, cl. 2 of the Constitution establishes that this Court's appellate jurisdiction is subject to "such exceptions" and "such regulations as the Congress shall make." This provision has long been understood as conferring upon Congress broad authority to restrict the Court's appellate jurisdiction. See *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1868).

The Act requires that a petitioner seeking to file a successive habeas corpus petition in district court must first obtain permission from the circuit court of appeals. Section 106(b)(3)(E) of the Act, 28 U.S.C. § 2244(b)(3)(E), provides that grant or denial by the court of appeals of such an application may not be reviewed on a petition for writ of certioriari. That limitation on this Court's jurisdiction to review successive federal habeas corpus petitions is constitutional in light of *McCardle* and other cases interpreting the clear language of the Exceptions and Regulations Clause.

2. This Court's jurisdiction to issue a writ of habeas corpus inquiring into the legality of a state prisoner's custody is premised solely on statutory authority granted by Congress. The reforms embraced in the Act therefore govern habeas corpus petitions filed as original matters in this Court pursuant to 28 U.S.C. § 2241. The Act does not purport to divest the Supreme Court of its power to entertain such a petition but neither does it require the Court to depart from its historic reluctance to consider original petitions other than in exceptional circumstances.

When confronted with a second or successive petition raising a new claim under § 2244(b)(2), this Court should decline jurisdiction unless the petitioner has first sought permission, in the court of appeals, to file the petition in the district court. If the petitioner has

tried and failed, this Court should exercise its jurisdiction to review the alleged constitutional violation only in the rarest of cases, involving a truly persuasive showing of actual innocence of the underlying offense.

3. The Act's limitations on federal review of successive habeas corpus challenges to state criminal convictions do not violate the Suspension Clause in Art. I, § 9 of the Constitution. The Writ of Habeas Corpus referred to in the Suspension Clause is limited to prisoners in federal custody and only guarantees the right to habeas corpus review as it existed under the common law at the time the Constitution was ratified. Because the authority of the federal courts to review state criminal judgments on habeas corpus derives entirely from statute, limitations on such review by Congress in the Act violate no constitutional rights.

ARGUMENT

I.

SECTION 106(b)(3)(E) OF THE ACT FALLS WITHIN CONGRESS'S POWER TO REGULATE THE SUPREME COURT'S "APPELLATE JURISDICTION" UNDER THE "EXCEPTIONS AND REGULATIONS" CLAUSE.

Petitioner first contends that § 106(b)(3)(E) of the Act unconstitutionally restricts the appellate jurisdiction of this Court. Because the provision makes unreviewable the decision of a court of appeals to deny *or* grant authority to file a successive habeas application, petitioner claims Congress has exceeded its authority under the Constitution to restrict the jurisdiction of the United States Supreme Court. The clear language of the "Exceptions and Regulations" Clause of Article III,

section 2, the historical purpose of that provision, and the unwavering case law construing it, however, all indicate that Congress acted well within its authority in placing this restriction on the Court's authority.

A. The Plain Language Of The "Exceptions And Regulations" Clause Defeats Petitioner's Claim.

From the beginning, the United States Constitution granted Congress express authority to regulate and restrict the appellate jurisdiction of the Supreme Court. Article III, § 2 states:

> In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction. In all other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.

U.S. Const. Art. III, § 2, cl. 2.

In providing that the Court's "appellate jurisdiction" is subject to "such exceptions" and "such regulations as the Congress shall make," the Constitution in simple terms grants the legislature authority to limit the Court's appellate jurisdiction. The "normal and ordinary" meaning, *United States v. Sprague*, 282 U.S. 716, 731-32 (1931), of "exceptions" and "regulations" indicates broad congressional power in this area.

When the Constitution was written, the authority to create "exceptions" conveyed the power to grant "an exclusion from a general rule or law," *Ash's Dictionary of the English Language* (1775), or meant "something taken out of a number of other things, and differing in some

particular," *Dyche's New General English Dictionary* (1781).[1] The authority to enact "regulations" likewise included the power "[t]o adjust by rule or method, to methodise, to dispose in order, to direct." *Perry's English Dictionary* (1805).

Confirming the broad authority that the Framers conveyed by using the word "regulations" is the manner in which the Framers employed it elsewhere in the Constitution. Aside from the "Exceptions and Regulations" Clause, the Constitution refers to Congress's authority over "regulation(s)" four times -- time, place and manner of Congressional elections, Art. I, § 4, cl. 1; land and naval forces, Art. I, § 8, cl. 14; prohibition against preference to any state in commerce, Art. I, § 9, cl. 6; return of slaves, Art. IV, § 2, cl. 3, and to the ability of Congress to "regulate" twice -- commerce with foreign nations and among states, Art. I, § 8, cl. 3; and coining money and fixing standard weights and measures, Art. I, § 8, cl. 5. Nothing about the Framers' employment of the term in these other provisions of the Constitution suggests any limitation on its accepted meaning. On the contrary, the term repeatedly conveys broad grants of lawmaking authority. *Cf.* Art. IV, § 2, cl. 3 (treating "Law" and "Regulations" synonymously). The power to "regulate" interstate commerce, for example, is among the most sweeping grants of authority in the Constitution. *Northeast Bancorp, Inc. v. Board of Governors*, 472 U.S. 159 (1985); *Wickard v. Filburn*, 317 U.S. 111 (1942); *Gibbons v. Ogden*, 22 U.S. 1 (1824).

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1. *See also Webster's American Dictionary of the English Language* (1828) ("The act of excepting, or excluding, from a number designated, or from a description . . . exclusion from what is comprehended in a general rule or proposition").

Other decisions from this Court confirm the broad authority the Framers granted to those given the power to "regulate" an area of law.

As a textual matter, then, it is difficult to see why the "Exceptions and Regulations" Clause means anything less than what it says. It grants broad congressional authority to "except" cases from the Court's appellate jurisdiction and otherwise to "regulate" that jurisdiction. Either grant or authority (and certainly the two together) permits Congress to cabin the appellate jurisdiction of the Court. And, in this instance, that authority clearly permits Congress to limit the Court's power to review the gatekeeping determination by the court of appeals as to whether a successive federal habeas petition may be filed in district court, a question that arises only after the Court has had at least three prior opportunities to review the petitioner's conviction and sentence.[2] Any argument to the contrary represents textual wishful thinking.

B. <u>The Framers' Understanding Of The "Exceptions And Regulations" Clause Mirrors Its Plain Meaning</u>

Besides being supported by the straightforward language of the "Exceptions and Regulations" Clause, Congress's power to enact § 106(b)(3)(E) is also supported by the Framer's understanding of the clause at the time it was ratified. Article III, to be sure, occupied far less of the ratification debate than other provisions of the Constitution. 2 *Records of the Federal Convention of*

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2. The petitioner potentially could seek certiorari review from the direct appeal of his judgment, from the denial of state collateral review, and from denial of federal habeas corpus relief.

1787 22, 46 (Max Farrand ed., 1911). But its provisions for a life-tenured judiciary with apparent authority to exercise judicial review did not go unnoticed. The Federalists and Anti-Federalists in particular debated whether the powers given the Third Branch had the potential to threaten democratic rule. *Federalists and Anti-Federalists: The Debate Over the Ratification of the Constitution* (John P. Kaminski and Richard Leffler, eds. 1989).

The Anti-Federalists, for example, argued that a life-tenured judiciary would not resist the temptation to aggrandize power over time. *See Brutus XI*, New York Journal, January 31, 1788. Attempting to deflate this claim, Alexander Hamilton pointed to Congress's ultimate authority to limit the Court's appellate jurisdiction under the "Exceptions and Regulations" Clause. He thus reassured his readers in Federalist No. 80 that "[i]f some partial inconveniences should appear to be connected with the incorporation of any of them into the plan, it ought to be recollected that the national legislature will have ample authority to make such exceptions, and to prescribe such regulations as will be calculated to obviate or remove these inconveniences." The Federalist, No. 80, at 541 (Hamilton) (J. Cooke ed., 1961).

Federalist Paper No. 81 is to the same effect. In emphasizing the limits on the appellate jurisdiction of the Court, Hamilton noted that "[i]n all other cases of federal cognizance, the original jurisdiction would appertain to the inferior tribunals; and the Supreme Court would have nothing more than appellate jurisdiction, 'with such exceptions and under such regulations as the Congress shall make.'" Hamilton then repeated the point, again attempting to defuse fears about the Court's powers by observing: "that of the partition of this authority a very small portion of original jurisdiction has been reserved to the Supreme Court, and

the rest consigned to the subordinate tribunals; that the Supreme Court will possess an appellate jurisdiction, both as to law and fact, in all cases referred to them, but subject to any exceptions and regulations which may be thought advisable." The Federalist No. 81, at 571 (Hamilton) (H. Dawson ed. 1863).

Future Chief Justice John Marshall similarly observed that "Congress is empowered to make exceptions to the appellate jurisdiction, as to law and fact, of the Supreme Court. These exceptions certainly go as far as the legislature may think proper for the interest and liberty of the people." 3 *Debates on the Federal Constitution* 560 (Jonathan Elliot 2d ed., 1888). The drafting history, individual views of the delegates about the provision, and its goal of defusing fears about the judiciary's power confirm that the Framers meant what they said when they gave Congress expansive power to limit the Court's appellate jurisdiction.

C. Case Law Construing The "Exceptions And Regulations" Clause Further Confirms The Broad Grant Of Authority Given To Congress.

Consistent with the plain language of the Constitution and the equally clear purpose of the Framers, this Court's decisions confirm Congress's broad authority to restrict the Court's appellate jurisdiction under the "Exceptions and Regulations" Clause.

Early decisions of the Court, written soon after the Constitution was ratified, indicate that the clause conveyed a broad grant of authority. In *Durousseau v. United States*, 10 U.S. (6 Cranch 307) 313 (1810), Chief Justice Marshall, a trend setter when it comes to judicial power, emphasized that it was the duty of Congress to spell out the Court's appellate jurisdiction. "[T]he appellate power of the Court," he stated, "shall not

extend to certain cases: [Congress] ha[s] described affirmatively its jurisdiction, and this affirmative description has been understood to imply a negative in the exercise of such appellate power as is not comprehended within it." *Id.* at 314. *See also Barry v. Mercein*, 46 U.S. (5 How.) 103, 119 (1847).

The well-accepted limitations on the Court's early jurisdiction over criminal cases illustrate this understanding. While Congress has continuously augmented the jurisdiction of the federal courts since the first Judiciary Act of 1789, "the First Judiciary Act is also significant for what it did not do." Rotunda & Nowak, *Treatise on Constitutional Law; Substance and Procedure* (2d Edition). "[I]t did not establish any general review in the Supreme Court of federal criminal cases." *Id.* "In fact, it was not until 1889 that there was generally established direct appeals in federal criminal cases." *Id. See United States v. Sanges*, 144 U.S. 310, 319 (1892); *see also United States v. Cross*, 145 U.S. 571 (1892); *Ex parte Bigelow*, 113 U.S. 328, 329 (1885). Notably, the Court never questioned this limitation on its jurisdiction (even with respect to capital cases), and indeed eventually placed its stamp of approval on the limitation. *McKane v. Dunston*, 153 U.S. 684 (1884) (holding that due process does not require an appeal in a criminal case).

Of course, in *Ex Parte McCardle*, 74 U.S. (7 Wall.) 506 (1868), this Court clarified Congress's authority over the Supreme Court's appellate jurisdiction in a habeas corpus action. In *McCardle*, a Mississippi newspaper editor was imprisoned for certain statements contravening the Reconstruction Act. Following rumors that the Supreme Court would use McCardle's case to declare the Reconstruction Act unconstitutional, Congress repealed the legislation that had given the Court jurisdiction to hear the case. *See* Rehniquist, *The American*

Constitutional Experience; Remarks of the Chief Justice, 54 La. L.Rev. 1161 (1994).

The Court accepted Congress's restriction on its appellate jurisdiction and dismissed the petition for want of jurisdiction. Speaking through Justice Chase, the Court indicated:

> We are not at liberty to inquire into the motives of the legislature. We can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction of this court is given by express words . . . without jurisdiction the court cannot proceed at all in any case. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the case. And this is not less clear upon authority than upon principle.

Ex parte McCardle, 74 U.S. (7 Wall. 506) 513-514 (1868).

McCardle no doubt sets the bench mark concerning Congress's broad power to restrict the Court's appellate jurisdiction. But it does not stand alone. Other decisions and other justices have revisited the issue at different intervals in the Court's history. Justice Frankfurter, in his dissenting opinion in *National Insurance Co. v. Tidewater Co.*, 337 U.S. 582, 655 (1949), noted that "Congress need not establish inferior courts; Congress need not grant the full scope of jurisdiction which it is empowered to vest in them; Congress need not give this Court any appellate power; it may withdraw appellate jurisdiction once conferred and it may do so even while the case is sub judice." Justice Douglas, in his concurring opinion in *Flast v. Cohen*, 392 U.S. 83, 109 (1968), concluded that "[a]s respects our appellate

jurisdiction, Congress may largely fashion it as Congress desires by reason of the express provisions of Section 2, Art. III." More recently, in *South Carolina v. Regan*, 465 U.S. 367 (1984), Justice O'Connor explained in a concurring opinion that "Article III expressly empowers Congress to make 'Exceptions' and 'Regulations' to the appellate jurisdiction" of the Supreme Court. *See also United States v. United Mine Workers of America*, 330 U.S. 258, 351 (1947) (Rutledge J., dissenting) ("This Court . . . has repeatedly confirmed Congress' power to control . . . its own appellate jurisdiction . . . [t]hat power includes the power to deny jurisdiction as well as to confer it.").

D. <u>Petitioner's Contrary Arguments Are Mistaken</u>

In attacking the constitutionality of 28 U.S.C. § 2244(b)(3)(E), any reliance on *United States v. Klein*, 80 U.S. 128 (1872), the *only* Court decision ever to strike down a statute enacted under Article III, § 2, would be mistaken. *Klein* merely stands for the proposition that Congress may not use the "Exceptions and Regulations" Clause to dictate the *outcome* of a case. Even in so ruling, however, the Court reiterated the power of Congress to deny appellate jurisdiction in a particular class of cases:

> If [the Act] simply denied the right of appeal in a particular class of cases, there could be no doubt that it must be regarded as an exercise of the power of Congress to make "such exceptions from the appellate jurisdiction" as should seem to it expedient.
>
> But the language of the proviso shows plainly that it does not intend to withhold appellate jurisdiction except as a means to an end . . .

> as to the Court of Claims, is founded solely on the application of a rule of decision, in causes pending, prescribed by Congress.

Klein at 145-146.

Klein thus expressly rejected any assertion that Congress is constitutionally prohibited from enacting legislation that restricts the jurisdiction of the Court. Here, in stark contrast to the statute in *Klein*, the Act does no more than except from review a narrow class of cases that in almost all instances will have received at least three prior considerations by this Court. Certainly, the enactment of such an exception is well within the power of Congress under Article III, Section 2, and under *Klein*. It is worth emphasizing, moreover, that this neutral restriction cuts both ways: it prevents both the state *and* the habeas petitioner from seeking review of the court of appeals' decision.

Moreover, even assuming the Court wished to limit the applicability of the Exceptions Clause, nothing short of a nullification of the provision would render the Act at issue unconstitutional. The right to appeal a circuit court determination regarding the propriety of a successive habeas corpus petition hardly relates to an essential function of this Court indispensable to its role in resolving constitutional conflicts. The circuit court's ruling involves precisely the type of pure factual determination that Congress must be allowed to regulate if the exceptions clause is to have any meaning whatsoever.

Nor can petitioner claim that the Act is unconstitutional because it completely eliminates review of successive petitions. The prisoner still may file an original habeas petition before the Supreme Court and, if allowed to pursue further collateral relief in state

court, could potentially seek review before this Court. *See Felker v. Zant*, 502 U.S. 1064 (1992) (denial of petition for certiorari to review state habeas corpus denial).

II.

THE PROVISIONS OF THE ACT APPLY TO PETITIONS FOR HABEAS CORPUS FILED DIRECTLY IN THE SUPREME COURT UNDER 28 U.S.C. § 2241.

The United States Supreme Court's power to issue a writ of habeas corpus, inquiring into the legality of a prisoner's custody under a state court judgment, is not rooted in the Constitution; it is, instead, premised solely on statutory authority controlled by Congress. *Ex parte Bollman,* 8 U.S. (4 Cranch) 74, 98-99 (1807); see *Fay v. Noia,* 372 U.S. 391, 407 (1962); *Ex parte McCardle,* 74 U.S. (7 Wall.) 506, 513-14 (1868). Congress, in the Act, has altered that authority. The Act does not purport to divest the Supreme Court of power to entertain a petition as an original matter. But the many statutory reforms embraced in Title I of the Act profoundly change the way federal courts adjudicate state-prisoner habeas corpus petitions, whether filed as original matters in the Supreme Court or elsewhere in the federal court system pursuant to 28 U.S.C. §§ 2241 and 2254.[3]

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3. The order granting certiorari indicated that briefing on this question should be limited to the Act's effect on this Court's statutory jurisdiction under § 2241. Amici therefore do not address whether § 2241, insofar as it would authorize this Court to entertain a petition as an original matter, might operate as an unconstitutional expansion of this Court's original jurisdiction under

A. Statutory Background

Since 1948, §§ 2241-2255 of Title 28 of the United States Code generally have constituted the statutory framework of the habeas corpus jurisdiction of this Court and the lower federal courts. These consolidated sections comprised the Habeas Reform Act that replaced earlier habeas corpus laws as part of Congress' revision of the Judicial Code in 1948. See *United States v. Hayman*, 342 U.S. 205, 210-16 (1952); Longsdorf, "The Federal Habeas Corpus Acts, Original and Amended," 13 F.R.D. 407, 415-16.

Section 2241(a) empowers, without differentiation, "[1] the Supreme Court, [2] any justice thereof, [3] the district courts and [4] any circuit judge" to grant a writ of habeas corpus inquiring into the legality of the prisoner's detention. Section 2241(b) allows "the Supreme Court, any justice thereof, and any circuit judge" to decline to entertain an application and to transfer it to the lower district court instead. Section

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Article III. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 175 (1803), held that Congress cannot expand the scope of this Court's original jurisdiction, and, in contrasting appellate authority, explained that "[t]he essential criterion of appellate jurisdiction [is] that it revises and corrects the proceedings in a cause already instituted, and does not create that cause." *Bollman*, in turn, characterized the power to grant a writ of habeas corpus, in a case in which the prisoner was in custody pursuant to the process of an inferior court, as appellate in nature. 8 U.S. at 98-99. In this brief, Amici do not take a position on whether *Marbury* or *Bollman* controls in determining this Court's jurisdiction to hear an original habeas corpus petition.

2241(c) sets out a general limitation of the habeas corpus power, mandating that the writ "shall not extend" to a prisoner unless he is subjected to a kind of "custody" specifically described in the statute.

In addition, § 2254 has provided further basic limitations upon the power of "the Supreme Court, a Justice thereof, a circuit judge, or a district court" to grant a habeas corpus application in the special context of a petition by a prisoner "in custody pursuant to the judgment of a State court." Since 1948, § 2254 has prohibited relief where the state prisoner has failed to exhaust available state court remedies; and, since 1966, it has mandated that, in many circumstances, state-court findings of fact are generally presumed correct in the federal proceedings.

As of April 24, 1996, Title I of the Act has changed the statutory authority of this Court, and the other federal courts, in additional ways. In large part, Title I specially addresses federal petitions for writs of habeas corpus filed by prisoners in custody under judgments of the state courts. Most significantly, Title I places time limitations on the filing and the course of litigation of such petitions, refocuses federal review on the reasonableness of the state courts' adjudication of the petitioners' federal claims, and accords state convictions new protections against belated and piecemeal attacks.

B. The Act Does Not Deprive This Court Of Power To Consider a Petition As An Original Matter.

The new provisions of the Act do not deprive the Supreme Court of its statutory authority to entertain a petition for writ of habeas corpus from a state prisoner in the first instance. The Act, first, does not directly amend § 2241(a) at all: it does not withhold the habeas corpus power from any of the enumerated judicial

officers or courts. Nor does it directly amend § 2241(c), which continues to restrict the writ from extending to persons who are not, at a minimum, "in custody" as described therein. Moreover, although the Act amends § 2254 significantly, it does not amend subdivision (a) in any way that deprives the Supreme Court, or any other federal court or judge previously empowered, of the authority to "entertain" a petition for writ of habeas corpus by a state prisoner.

C. In Considering An Original Petition, This Court Must Follow The Provisions Of The Act.

The Act amends §§ 2244 and 2254, and adds other statutory provisions that dramatically change the way this Court and other federal courts may treat habeas corpus petitions from state prisoners. For example, the Act sets up a limitations period for the filing of state-prisoner petitions, §101 [28 U.S.C. §2244(d)], allows federal courts to deny on the merits petitions of state prisoners who fail to exhaust state remedies, § 104 [§ 2254(b)(2)], sets out a new and deferential standard for federal review of state court decisions on federal questions and factual issues, *id.* [§2254(d),(e)(1)], prohibits discretionary evidentiary hearings for claims not developed in state court, *id.* [§2254(e)(2)], precludes relief on successive applications by state prisoners repeating old claims, § 106 [§2244(b)(1)], and imposes restrictions on both the filing and the adjudication of successive applications by state prisoners raising new claims, *id* [§ 2244(b)(2)]. Also, in capital cases from states with qualifying appointment-of-counsel practices, the Act imposes an additional set of requirements that in general serve to restrict review and limit the length of federal litigation. §107 [28 U.S.C. §§2261-2266].

These provisions, and Title I in general, apply to the adjudication of a petition filed as an original matter in the Supreme Court, as they apply to petitions filed in other federal courts. There is no reason to think otherwise. This Court has never suggested that its power to grant relief to a prisoner challenging the cause of his confinement under a state court judgment is broader under § 2241 than it is under § 2254, or that the § 2241 power is independent and unaffected by the other statutory provisions of the habeas corpus framework in the Judicial Code.

Nor has this Court indicated that its own jurisdiction over an original habeas corpus petition differs in kind from that exercised by other federal judges, or is in any way exempt from statutory limitations that apply to federal petitions in general. On the contrary, the Rules of this Court assume the applicability of the general statutory framework governing habeas corpus petitions. Rule 20.4(a) thus provides that an original petition "shall comply with the requirements of 28 U.S.C. §§ 2241 and 2242." And, "[i]f the relief sought is from the judgment of a state court, the petition shall set forth specifically how and wherein the petitioner has exhausted available state remedies in the state courts or otherwise comes within the provisions of 28 U.S.C. § 2254(b)."

D. Illustration: Amended § 2244(b) And Original Petitions Filed In The Supreme Court.

The case at bar, of course, illustrates one area where the new Act operates differently with respect to the district court and the courts of appeals than it does with respect to the Supreme Court. Section 106 of the Act, amending 28 U.S.C. § 2244, provides that a new claim presented under § 2254 by a state prisoner in a second or successive habeas corpus application shall be

dismissed unless the petitioner shows that the claim relies upon a retroactive new rule of law as defined narrowly in subdivision (b)(2)(A), or the factual predicate of the claim previously had been unavailable and constitutes proof of legal innocence as defined narrowly in (b)(2)(B)(i-ii).[4] Before the petitioner may file such a successive petition in the district court, however, he first must obtain permission by motion before a three-judge panel of the court of appeals. § 2244(3). Under § 2244(b)(3)(E), the court of appeals' ruling "shall not be the subject of a petition for rehearing or a petition for writ of certiorari."

Section 2244(b), by its terms, governs the ultimate filing of a successive petition in the district court. It does not expressly purport to govern the filing of such a petition as an original matter in the Supreme Court. But the Court's discretion to consider a petition as an original matter should not be exercised in a way that would defeat the effect of other restrictions the Act imposes upon habeas corpus.

Just as this Court retains the power to entertain a state-prisoner petition as an original matter, it also retains its broad discretion to decline to exercise jurisdiction over such original petitions. As stated in the Supreme Court Rules,

> To justify the granting of a writ of habeas corpus, the petitioner must show exceptional circumstances warranting the exercise of the Court's discretionary powers and must show

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4. In death penalty cases arising from states with qualifying procedures, an amendment of the petition after answer also must comport with restrictions that otherwise apply to second and successive petitions. 28 U.S.C. § 2266(b)(1)(B).

> that adequate relief cannot be obtained in any other form or from any other court. These writs are rarely granted.

Rule 20.2, Rules of Sup. Ct.; *see In re McDonald,* 489 U.S. 180, 184-5 (1989) (per curiam). In practice, this Court reportedly has adjudicated on the merits only four habeas corpus petitions as original matters during this century. Liebman, *Federal Habeas Corpus Practice & Procedure* (2d ed.) 1172 n.15, 1174 n.2; Oaks, *The "Original" Writ of Habeas Corpus in the Supreme Court,* 1962 Sup. Ct. Rev. 153.

There is certainly no reason for this Court to depart from its long-standing practice of ordinarily declining to exercise jurisdiction over original petitions. Indeed, the Court ought to proceed with special care so as not to frustrate the Act's legitimate new restrictions on successive petitions.

If a petitioner bringing a successive § 2244(b)(2) application has not first sought permission to file it in the appropriate district court, through a motion in the court of appeals under § 2244(b)(3)(A), he should be turned away at the threshold and should not be allowed as a matter of course to invoke the Supreme Court's habeas jurisdiction as an original matter. Declining to extend jurisdiction would comport with § 2242, which provides that, "if addressed to the Supreme Court . . . [the application] shall state the reasons for not making the application to the district court . . . ," and with Rule 20.4(a), which requires a demonstration "that adequate relief cannot be obtained in any other form or from any other court." *See Ex parte Abernathy,* 320 U.S. 219, 220 (1943).

If the petitioner in fact has properly sought, but has failed to obtain, permission to file from the court of appeals, and he also shows that he cannot obtain relief

"from any other court," then this Court may continue to determine as a matter of discretion whether the allegations warrant extending jurisdiction to the petition. In deciding whether to exercise its discretionary jurisdiction over such a petition, this Court well might consider the question that the petitioner had submitted in his motion to the court of appeals: whether there is a "prima facie showing that the application satisfies the requirements of" § 2244(b)(2). The Court should not, however, extend its jurisdiction on those grounds alone. To do so would replicate the very certiorari review of the appellate court's ruling that § 2244(b)(3)(E) specifically precludes.

Instead, the Court could consider whether the petitioner has made an "extraordinarily high threshold showing" of actual innocence, as described in *Herrera v. Collins,* 506 U.S. 390, 417 (1993). Although the role of "actual innocence" as a ground for relief under the Act might be open to debate -- new § 2244(b)(2)(B)(ii) itself seems to envision a showing of innocence only as a gateway for proof of "constitutional error," *see* 506 U.S. at 404-405 -- a threshold showing of actual innocence would be a most appropriate guideline for determining whether at least to extend discretionary jurisdiction to allow consideration of a successive petition otherwise permitted by the new Act. Requiring such a showing, moreover, would further serve to differentiate, in a meaningful way, the Supreme Court's discretionary decision to assert jurisdiction over the petition as an original matter from the kind of certiorari review of the court of appeals' decision on the motion to file that the Act precludes. Absent such a limitation, the Court might appear to be merely circumventing § 2244(b)(2).

If this Court actually were to choose to entertain a successive petition as an original matter under §§ 2241 and 2254 and to accord the case plenary consideration,

its ultimate adjudication of the petition would still be subject to the new Act and §§ 2241-2266. Thus, if the Court indeed were to allow the petition to be filed and considered as an original matter, it ultimately might have to deny relief under § 2244(b)(2) anyway. For, unless the Court determined on the merits that the new claim met the statute's successive-petition criteria, the statute would require that the petition "shall be dismissed." And, even if the petition were deemed to meet that criteria so as to avoid dismissal on Section 2244 grounds, relief in the end might be precluded anyway by operation of other provisions of the Act.

The need to comply with the both the new and the long-standing general restrictions on this Court's habeas corpus jurisdiction, and the need to account for the practical difficulties that arise when an appellate court undertakes an inquiry into facts, combine to militate strongly against exercises of the Court's discretionary power except in the rarest of instances. Assuming a truly persuasive showing of actual innocence might justify allowing a successive petition to be filed in this Court, for consideration of an alleged constitutional violation in light of the new Act's many reforms of habeas law, review on any lesser showing risks undermining the new restrictions on second bites at the apple contrary to the will of Congress.

III.

APPLICATION OF THE ACT IN THIS CASE DOES NOT VIOLATE ARTICLE I, § 9, CLAUSE 2 OF THE CONSTITUTION.

The limitations on federal habeas review for prisoners in state custody provided by the Act do not "suspend" habeas corpus review in violation of Article I, § 9, cl. 2 of the Constitution. Because that provision of the Constitution does not provide for habeas relief for prisoners in state custody, the limitations of the Act necessarily cannot be in violation of it. Moreover, even if the prohibition against suspending the writ of habeas corpus contained in Article I extended to prisoners held in state custody, that provision refers only to the common law writ of habeas corpus as it existed at the time the Constitution was ratified, not the type of post-conviction review now routinely exercised by the federal courts under the statutory authorization of Congress.

A. The Suspension Clause Does Not Apply To Prisoners In State Custody.

At the time of the ratification of the Constitution in 1789, it was clearly understood that Article I, § 9, cl. 2, did not guarantee a right to habeas corpus review for prisoners in state custody. The Framers of the Constitution were concerned about limiting the powers of the federal government. *See United States v. Cruikshank*, 92 U.S. (2 Otto) 542 (1875); *M'Culloch v. Maryland*, 17 U.S. (Wheat) 316 (1819). Section 9 of Article I, where the Suspension Clause is located, enumerates various limitations on federal government. It provides in clause 2:

> The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

Section 10 of Article I, the corresponding section containing limitations on state authority, does not provide a right to habeas corpus.

Perhaps more importantly, the actions of the First Congress, in providing for habeas corpus review, demonstrate that the writ referred to in the Suspension Clause was unequivocally limited to review of federal custody. *See* Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 81-82 ("[W]rits of habeas corpus shall in no case extend to prisoners in gaol, unless where they are in custody, under or by colour of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify").

Commenting on the Judiciary Act of 1789 in *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 95 (1807), Chief Justice Marshall made two important observations. First, he noted that there was no inherent power in the Constitution to award the writ of habeas corpus, but that such power "must be given by written law." *Id.* at 93-94. *See Ex parte Dorr*, 44 U.S. (3 How.) 103, 105 (1845) (federal courts' power to issue writ of habeas corpus does not exist unless conferred by statute). Second, he demonstrated that the clear understanding of the First Congress in providing the written law in support of the Suspension Clause was that it has no application to federal habeas review for prisoners in state custody.

> Acting under the immediate influence of this injunction [the Suspension Clause], they [the First Congress] must have felt, with peculiar force, the obligation of providing efficient

means by which this great constitutional privilege should receive life.

Ex parte Bollman, 8 U.S. (4 Cranch) at 95. By implication, the First Congress's provisions for the writ of habeas corpus were coextensive with the Constitutional writ and did not extend to persons in state custody. *Ex parte Dorr*, 44 U.S. (3 How.) at 105.[5]

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5. The Court or individual justices of the Court have occasionally alluded to the possibility that the Suspension Clause may guarantee a right of habeas corpus for prisoners in state custody. *See, e.g. Fay v. Noia*, 372 U.S. 391, 406 (1963) ("We need not pause to consider whether it was the Framers' understanding that congressional refusal to permit the federal courts to accord the writ its full common-law scope as we have described it might constitute an unconstitutional suspension of the privilege of the writ. There have been intimations of support for such a proposition in decisions of this Court.") (citations omitted); *Townsend v. Sain*, 372 U.S. 293, 311 (1963) ("We pointed out there that the historic conception of the writ, anchored in the ancient common law and in our Constitution as an efficacious and imperative remedy for detentions of fundamental illegality, has remained constant to the present day.") (*citing Noia*); *Jones v. Cunningham*, 371 U.S. 236, 238 (1963) ("The habeas corpus jurisdictional statute implements the constitutional command that the writ of habeas corpus be made available.") (*citing* the Suspension Clause). However, there has never been any analysis accompanying such references. On the other hand, discussion regarding the authority of federal courts to review state court convictions in federal habeas proceedings has routinely been premised on the statutes providing for such review. *See, e.g., Lonchar v. Thomas*,

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116 S.Ct. 1293, 130-1301 (1996) (Congress, not the Court, has the authority to establish a statute of limitations for habeas corpus cases); *Withrow v. Williams*, 507 U.S. 680, 715 (1993) (Scalia, J., concurring in part and dissenting in part) ("By statute, a federal habeas court has jurisdiction over any claim that a prisoner is 'in custody in violation of the Constitution' or laws of the United States." (citing 28 U.S.C. §§ 2241(c)(3), 2254(a), 2255)); *Kuhlman v. Wilson*, 477 U.S. 436, 446 (1986) (plurality opinion) (noting "Congress first authorized the federal courts to issue the writ on behalf of persons in state custody" in 1867); *Barefoot v. Estelle*, 463 U.S. 880, 892 n.3 (1983) (referencing Habeas Corpus Act of 1867 as "the First Act empowering federal courts to issue a writ of habeas corpus for persons in state custody"); *Swain v. Pressley*, 430 U.S. 372, 385 (1977) (Burger, C.J., dissenting) ("The fact is that in defining the scope of federal collateral remedies the Court has invariably engaged in statutory interpretation, construing what Congress has actually provided, rather than what it constitutionally must provide."); *Schneckloth v. Bustamonte*, 412 U.S. 218, 253 (1973) (Powell, J., concurring) ("Federal habeas review for state prisoners was not available until the passage of the Habeas Corpus Act of 1867"); *Brown v. Allen*, 344 U.S. 443, 460-61 (1953) ("Jurisdiction over applications for federal habeas corpus is controlled by statute."); Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U.Chi.L.Rev. 142, 170 (1970) ("It can scarcely be doubted that the writ protected by the suspension clause is the writ as known to the framers, not as Congress may have chosen to expand it or, more pertinently, as the Supreme Court has interpreted what Congress did." (footnote omitted)).

B. The Suspension Clause Guarantees Only The Right To Habeas Corpus As It Existed Under Common Law.

In addition to being limited to prisoners in federal custody, the writ referred to by the Suspension Clause is necessarily that existing under common law at the time the Constitution was ratified, which did not extend to questions of custody derived from a criminal conviction. *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 201-02 (1830); *Ex parte Bollman*, 8 U.S. (4 Cranch) at 93-94 ("for the meaning of the term habeas corpus, resort may unquestionably be had to the common law"). In this regard, the Court looked to the English Habeas Corpus Act of 1679, which "enforces the common law." *Ex parte Watkins*, 28 U.S. (3 Pet.) at 202. Specifically exempted from benefiting from the English Act of 1679 were those who had been convicted. *Id.* Thus, conclusive of the determination of a petition for writ of habeas corpus was whether a court of general jurisdiction had entered judgment. *Id.* at 209. *See also McCleskey v. Zant*, 499 U.S. 467, 478 (1991).

Cases applying the 1789 habeas statute in the late nineteenth century demonstrate that the common-law understanding prevailed when Congress, in 1867, generally extended federal habeas jurisdiction to persons in state custody. *E.g., Ex parte Parks*, 93 U.S. (3 Otto) 18, 21-23 (1876) (federal custody); *see* Forsythe, *The Historical Origins of Broad Federal Habeas Review Reconsidered*, 70 Notre Dame L. Rev. 1079, 1124-40 (1995) (discussing historical use of habeas corpus under Act of 1789 and Act of 1867); Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441, 465-83 (1963) (same). As explained in *Ex parte Siebold*, 100 U.S. (10 Otto) 371, 375 (1879):

> The only ground on which this court, or any court, without some special statute authorizing it, will give relief on habeas corpus to a prisoner under conviction and sentence of another court is the want of jurisdiction in such court over the person or the cause, or some other matter rendering its proceedings void.

Even under the broader scope of the 1867 Act, moreover, the Court made clear that the existence of constitutional error during the course of judicial proceedings generally would not provide a basis for discharge on writ of habeas corpus. *E.g., Wood v. Brush*, 140 U.S. 278, 287-88 (1891) (African-American's claim that members of his race were unconstitutionally excluded from juries was not cognizable on habeas corpus because error would not render state conviction void or deprive court of jurisdiction); *Ex parte Bigelow*, 113 U.S. 328, 330-31 (1884) (claim that retrial would violate double jeopardy prohibition, if true, would not deprive court of jurisdiction or render proceedings void and, thus, habeas would not lie to prevent retrial). This is consistent with Congress's understanding, as reflected in its 1884 debates concerning the restoration of this Court's appellate jurisdiction, that the 1867 Act did not authorize the overturning of final judgments of state courts. *See* Forsythe, 70 Notre Dame L. Rev. at 1117-24; Bator, 76 Harv. L. Rev. at 477. The debate reveals that appellate jurisdiction was returned to the Court so that it could curtail expansive, and in Congress's view unauthorized, use of the writ by lower federal courts following the elimination of the Court's appellate jurisdiction in 1867. With the restoration of its appellate jurisdiction and until the early twentieth century, the Court continued to limit the writ to redressing void judgments or sentences or instances in which the Court

was without jurisdiction. *E.g., Henry v. Henkel*, 235 U.S. 219, 228-29 (1914); *Harkrader v. Wadley*, 172 U.S. 148, 163 (1898); *see* Bator, 76 Harv. L. Rev. at 478-83.

The genesis of the expansive view of "jurisdictional" issues for purposes of federal habeas review can be traced to *Frank v. Mangum*, 237 U.S. 309 (1915). There, the Court for the first time held that a trial in state court dominated by mob rule could be grounds for federal habeas relief, because such a trial would deprive the court of authority to issue a valid judgment. *Id.* at 327. Debate as to the rationale for this expansive view of federal habeas corpus has centered on whether unavailability of a corrective process was a threshold to consideration on federal habeas review, or whether unavailability of a state corrective process was the constitutional violation itself. *See Wright v. West*, 112 S.Ct. 2482, 2486-87 (1992); *id.* 112 S.Ct. at 2493 (O'Connor, J., concurring). It is not necessary to resolve this issue, however, because the inquiry into trial procedures is inconsistent with the analysis of *Ex parte Watkins*, which looked only to whether the convicting court had general jurisdiction over the criminal trial, not to procedures occurring at trial that could "deprive" the court of jurisdiction. 28 U.S. (3 Pet.) at 209. *Frank v. Mangum* and the cases following are the basis for the broad federal habeas review culminating in *Brown v. Allen*, 344 U.S. 443 (1953). While these cases defined the scope of Congress' statutory habeas remedy, it is *Ex parte Watkins* that defines the limits of the constitutional entitlement under the Suspension Clause.

In sum, there can be no unconstitutional suspension of the writ of habeas corpus where there is not a requirement that a writ of habeas corpus be provided.

C. Congress Permissibly Exercised Its Constitutional Authority In Limiting Availability Of The Writ For State Prisoners Who Previously Had An Opportunity To Litigate Federal Claims.

Even with the "limitations" on the availability of habeas corpus review for prisoners in state custody contained in the Act, the current availability of federal habeas corpus review is generous by constitutional standards. More particularly, the amendments to the habeas statutes limiting successive habeas applications were a proper exercise of Congress's authority. Judicial limitations on the exercise of federal habeas jurisdiction have, appropriately, been created "when Congress has not resolved the question." *Lonchar v. Thomas*, 116 S.Ct. 1293, 1298 (1996). Congress previously authorized dismissal of second or successive petitions in 28 U.S.C. § 2254 cases, and this Court properly established standards for the exercise of that discretion. *McCleskey v. Zant*, 499 U.S. 467, 496 (1991). Given these existing limitations, it is too late to plausibly argue that state prisoners are *entitled* to federal review of second petitions or that Congress is powerless under the Constitution to legislate in this regard. Additionally, the Court has long recognized that federal habeas review of state court detentions, particularly of final convictions, implicates weighty considerations of federalism and comity. *E.g., McCleskey v. Zant*, 499 U.S. at 490-92; *Wainwright v. Sykes*, 433 U.S. at 87-90; *Ex parte Royall*, 117 U.S. 241, 253 (1886). Congress' consideration of these factors when delineating the scope of the statutory habeas remedy is entirely appropriate. *Lonchar*, 116 S.Ct. at 1300-01.

A state prisoner filing a second federal habeas petition necessarily will have had one, and probably more than one, opportunity for full and fair litigation of his

constitutional claims: on direct appeal, on state collateral review, and in his first federal habeas petition. Thus, even aside from the textual and historical limitations on the scope of the writ guaranteed by the Constitution, limitations on the availability of habeas relief for a second or successive habeas petition would not constitute a suspension of the writ.

CONCLUSION

For the reasons stated above, Amici respectfully submit that the Court should dismiss the order granting certiorari and deny the petition for writ of habeas corpus.

Dated: May 16, 1996.

Respectfully submitted,

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